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ABSTRACT

This publication examines a number of court cases involving the publication and distribution of various publications by high school students. In Scoville v. Board of Education of Joliet Township High School District 204, the court ruled that the content of student publications may be regulated only when the administrator acts upon "a reasonable forecast of a substantial disruption of school activity." In Schwartz v. Schuker and Katz v. McAulay, the courts ruled that appropriate disciplinary action may differ for college students and high school students. In Riseman v. School Committee of the City of Quincy, the court ruled that students may distribute publications in school buildings in an "orderly and not substantially disruptive" way, outside of classes or study periods. However, the court also supported the principal's authority to regulate the time, place, and manner of distribution. Student publications guidelines from the New Jersey commissioner's decision, Goodman v. Board of Education, are presented to aid school administrators in establishing or modifying their own regulations. (JG)

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NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

A Legal Memorandum

1201 Sixteenth Street, N.W. Washington, D.C. 20036

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October, 1971

Concerning

STUDENT PUBLICATIONS

Student publications, always a vital concern for school administrators, is a subject area in which the judiciary continues to narrow the "in loco parentis" doctrine and concurrently to apply adult standards of "responsible" journalism. The cases that follow, both for and against school administrations, generally illustrate the attitude of the courts toward student publications.

Content - Censorship

Freedom of communication for high school students was clearly affirmed in the major case of *Scoville v. Board of Education of Joliet Township High School District 204* (Ill.) 286 F. Supp. 988 (1968) 425 F2d 10 (1970). The high school's literary journal severely criticized the school administration, charging that (they are) "utterly idiotic" and "asinine." It also charged that "(the) whole system of education with all its arbitrary rules and schedules seems dedicated to nothing but wasting time." One high school official was described as having a "sick mind." An editorial encouraged all students in the future either to refuse to accept or to destroy upon acceptance all propaganda that the administration published.

The lower district court sustained the school board's decision to expel those students who distributed the publication, saying, "...Despite the First Amendment, speech may be regulated where there is a 'clear and present danger' that substantive evil will result...." The Circuit Court, however, on appeal overturned the school board's decision. It stated:

> Plaintiff's [the student's] freedom of expression was infringed by the [school] Board's action, and defendants [school board] had the burden of showing that the action was taken upon a reasonable forecast of a substantial disruption of school activity ....The criticism of the [school's] disciplinary policies and the mere publication of that criticism...leaves no room for *reasonable inference* [emphasis added] justifying the Board's action ....

In a very similar New York case, *Schwartz v. Schuker*, 298 F. Supp. 238 (New York, 1969), the U.S. District Court upheld the school board in its expulsion of a high school student for activities growing out of distribution of

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copies of an underground newspaper off school grounds, but near the school building. The newspaper generally depreciated school officials and frequently used filthy language. Again the student's claim was violation of his right to free speech.

Unlike the decision in the Scoville case, the court sustained the suspension, and in so doing, made an important distinction between high school and college students.

> The freedom of speech and association protected by the First and Fourteenth Amendments are not 'absolute' and are subject to constitutional restrictions for the protection of the social interest in government, order and morality.... The activities of high school students do not always fall within the same category as the conduct of college students, the former being in a much more adolescent and immature stage of life and less able to screen facts from propaganda.

The court concluded:

> While there is a certain aura of sacredness attached to the First Amendment, nevertheless, the First Amendment rights must be balanced against the duty and obligation of the state to educate students in an orderly and decent manner to protect the rights not of a few but of *all* [emphasis added] the students in the school system. The line of reason must be drawn somewhere in this area of ever expanding permissibility. Gross disrespect and contempt for the officials of an educational institution may be justification not only for suspension but also expulsion of a student.

Censorship of student publications was also the issue in *Korn v. Elkins*, 317 F. Supp. 138 (Maryland, 1970). In upholding the student's right to publish an illustration, the court applied the standard used by the U.S. Supreme Court in *Street v. New York*, 394 U.S. 576 (1969). There, the Supreme Court delineated several reasons which could be considered sufficient cause to curtail freedom of expression: (1) prevention of incitement of others to commit unlawful acts, (2) prevention of the utterance of words so inflammatory they provide for physical retaliation, (3) protection of the sensibilities of others, and (4) assurance of proper respect for the national emblem.

Prior Approval and Distribution

Eisner et al. v. Stamford Board of Education et al., Civ. No. 35345 (Connecticut, 1971) affirmed a lower court decision upholding the right of high school students to distribute a student newspaper without prior approval of its contents.

Although the lower court declared the regulations a "classic example of prior restraint of speech" and lacking procedural safeguards, the circuit appeals court affirmed the decision only on the point that the regulations failed to provide for an adequate "review procedure." The court said that certain communications, e.g., libel, profanity, obscenity, or "fighting words" (those that incite confrontation) could be subject to prior restraint. The key test, it added, would be whether the school regulations were directed to one of these categories of permissible prior restraint.

The court in the *Eisner* decision cited the now famous Supreme Court case *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) in reaching its decision that the regulation was clearly unconstitutional because it failed to proscribe an acceptable review procedure for the prior submission of material. The procedure failed in the following ways: lack of a specific time period for acceptance or rejection of material; no indication of to whom and in what manner material should be submitted for clearance; and absence of a clear definition of the term "distributing." In the court's words:

> This lawsuit arises at a time when many in the educational community oppose the tactics of the young in securing a political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication, may be precluded from doing so by that same adult community.
>
> We assume, therefore, that the Board contemplates that it will require prior submission only when there is to be a *substantial* distribution of written material, so that it can reasonably be anticipated that in a significant number of instances there would be a likelihood that the distribution would disrupt school operations.

This decision must be read in the light of earlier important court pronouncements: *Dickey v. Alabama Board of Education*, 273 F. Supp. 613 (Alabama, 1967) in which the court ruled that a student newspaper editor at a public school *could not* be punished or expelled for violating a college rule that prohibited criticism of the state government; *Zucker v. Panitz*, 299 F. Supp. 102 (New York, 1969), in which it was ruled that refusing political advertisement--"The United States is pursuing a policy in Vietnam which is both repugnant to moral and international law and dangerous to the future of humanity. We can stop it. We must stop it."--and accepting commercial advertising, violated the First Amendment as censorship of a certain class of ideas. Similar views were expressed by the court in *Lee v. Board of Regents of State Colleges*, Nos. 18404 and 18405 (7th Circ., 1971) and in *Autonelli v. Hammond*, 308 F. Supp. 1329 (Massachusetts, 1970).

Riseman v. School Committee of the City of Quincy, No. 7715 (1st Circ., March 11, 1971) considered the right of a high school student who was prevented from distributing political literature (anti-Vietnam) on school property during

school hours because of a regulation prohibiting use of school facilities "in any manner for advertising or promoting the interests of any community or non-school agency without the approval of the School Committee." The court struck down the regulations and allowed distribution in buildings in an "orderly and not substantially disruptive" manner, excluding distribution in classes or study periods. *The court clearly sustained the principal's authority to promulgate time, place, and manner of such distribution,* provided, however, that advance approval of the content of the communication was not required.

High School - College Students Distinguished

An important case because of the distinction drawn between students of different ages and maturity is *Katz v. McAulay,* No. 35144 (2nd Cir. Feb. 11, 1971). In this case, high school students were under threat of expulsion for soliciting funds on school grounds for the defense of the "Chicago Eight." Handbills for this purpose were distributed before the school day began without interfering with normal class operation or the rights of the student body. The school regulations in question prohibited all solicitations except for the Junior Red Cross, and this only with permission from local school authorities. The students' major claim was that the regulation was "overbroad."

The appellate court affirmed the lower court's position that the interferences the school wished to avoid were material, i.e., "the pressures upon students of multiple solicitations...the student body was a captive audience from which to solicit funds for various causes...this activity in effect competed with the school for student attention and interest." The court pointed out that its decision rested on "*demonstrable harm*" and not simply "undifferentiated fear of disturbance" and, therefore, was not in conflict with *Scoville v. Board of Education,* cited earlier.

The court also distinguished between regulations reasonable for high school students and those acceptable for college age students when it stated:

> ...[W]e proceed on the premise that a state may decide that the appropriate discipline which requires the restriction of certain communicative actions may differ in the cases of university students from that called for in the cases of the younger secondary school pupils in relatively similar circumstances.

Non-Students Distinguished

In *State v. Owen,* 480 P. 2nd 766 (Washington, 1971), non-students were arrested for distributing materials on school grounds without prior permission from school authorities in violation of the following statute:

> Every...person except a person enrolled as a student... or parents or guardians of such students or persons employed by such school or institution, who without a lawful purpose therefore willfully loiters about the building or buildings of any public or private school or institution of higher learning or the public premises adjacent thereto [is a vagrant].

The constitutionality of this statute was challenged for "vagueness" and for being "overbroad." The students contended that the regulation constituted an impermissible prior restraint on free speech based on the *Tinker v. Des Moines Independent Community School District* case. The court, however, did not consider the Tinker decision applicable because it did not concern the rights and obligations of non-students or others unassociated with the school community, and ruled to uphold the statute.

Conclusion

Guidelines of at least a general nature should be established clearly categorizing material which is libelous, obscene, scandalous, or clearly provocative as unacceptable. It may well be necessary for principals to insist upon the right of distribution, or prior review, to ensure that they have an opportunity to make this judgment. To avoid unnecessary legal confrontation, suspension, and/or disruption, school regulations should provide for the appeal of the principal's decision leading to final determination by the board. This would afford the board more participation in case-by-case process. It would also avoid throwing an impasse immediately over to the courts and assist in achieving uniformity within a particular school district.

Generally, the restrictions and regulations governing *responsible* journalism, as defined by the American Society of Newspaper Editors, should be applied with the clear understanding that school officials have the authority, *indeed the duty*, to provide for an ordered educational atmosphere free from constant turmoil and distraction.

To aid principals in promulgating new guidelines on student publications, or re-examining current regulations, insofar as that is necessary, the guidelines from the case of *Goodman v. Board of Education,* (New Jersey Commissioner's Decision, March 12, 1971) are printed on the next page for your review.

Further information on this subject is published in *The Reasonable Exercise of Authority* by Robert L. Ackerly, National Association of Secondary School Principals, 1201 Sixteenth Street, N.W., Washington, D. C. 20036. Copies are available at $1 each, with a 20 percent discount for 10 or more copies. Payment must accompany orders of $5 or less.

GUIDELINES FOR DISTRIBUTION OF HIGH SCHOOL NEWSPAPERS AND LEAFLETS

A. Places: On the school sidewalk in front of the main entrance to building and the walk in front of the gym lobby. (In case of bad weather, two pupils only would be permitted each in the front main lobby and in the gym lobby. Specific approval to distribute materials inside would be required each time.)

B. Time: 7:45 - 8:15 a.m., 2:46 - 3:15 p.m.

C. Approval: The previous day or earlier by appropriate class dean or principal, if dean should be absent. For materials not readily classifiable or approvable, more than one day should be allowed.

D. Littering: All distributed items which are dropped in the immediate area (on the front sidewalk and lawn to the street, for example, or the two inside lobbies and adjacent corridor for 50-75 feet) must be removed by persons distributing material. Wastebaskets will be provided.

E. Unacceptable items: "So-called 'hate' literature which scurrilously attacks ethnic, religious and racial groups, other irresponsible publications aimed at creating hostility and violence, hardcore pornography, and similar materials are not suitable for distribution in the schools."

Materials denigrating to specific individuals in or out of the school.

Materials designed for commercial purposes--to advertise a product or service for sale or rent.

Materials which are designed to solicit funds, unless approved by the Superintendent or his assistant.

"Literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election..."

F. Acceptable materials: Materials not proscribed in section F unless dean or principal should be convinced that the item would materially disrupt classwork or involve substantial disorder or invasion of the rights of others.

G. Appeal: Pupil denied approval may appeal to the principal who with a student advisory committee of one representative from each class will review the matter. Should the petition be denied, the petitioner may still appeal to the Superintendent, then to the Board of Education.

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